

Questions & Answers on the Agricultural Job Opportunity, Benefits, and Security (AgJobs) Act of 2003 (S. 1645/H.R. 3142)

American Immigration Lawyers Association

1. How Would AgJob's Earned Adjustment Program Operate?

The AgJobs Act creates an earned adjustment program for undocumented agricultural workers who would be eligible to apply first for temporary resident status based on their past work experience, and then to become permanent residents upon satisfying prospective work requirements. To be eligible for the program, the individual must demonstrate that he or she performed agricultural work in the U.S. the lesser of 575 hours or 100 work days during any 12 consecutive months in the 18-month period ending on August 31, 2003. The application period would begin on the first day of the seventh month after enactment and would run for 18 months. Eligible applicants would be granted temporary resident status while they work towards the permanent residence requirements.

After acquiring temporary resident status, workers may be employed in non-agricultural occupations, as long as they meet their agricultural work requirements. While in temporary resident status, workers may select their employers and switch employers.

If the worker performs at least 2060 hours or 360 work days (whichever is less) of agricultural employment during the six-year period ending on August 31, 2009, including at least 240 work days during the first three years following adjustment to temporary status, and at least 75 days of agricultural work during each of three 12-month periods in the six years following adjustment to temporary resident status, the worker may apply for permanent resident status. Eligible individuals must apply for adjustment to permanent resident status by August 31, 2010.

Aliens granted temporary residence under this program who fail to fulfill the agricultural work requirements for permanent residence, or who fail to apply for such status before the expiration of the application period, are subject to removal. Similarly, an alien's temporary resident status may be terminated and adjustment denied if the Secretary of Homeland Security determines that such status was the result of fraud or willful misrepresentation, if the alien commits an act that renders him or her inadmissible, or if the alien is convicted of a felony or three or more misdemeanors while in temporary resident status.

2. What Provision Does the Legislation Make for the Spouses and Minor Children of Temporary Resident Agricultural Workers in the Earned Adjustment Program?

During the period of temporary resident status, the worker's spouse and minor children who are residing in the United States may remain here, but are not employment authorized. The spouse and minor children may adjust to permanent resident status when the worker adjusts to permanent resident status.

3. May Aliens Granted Temporary Residence Under the Program Travel Outside of the United States?

Yes. During the period of temporary resident status, the agricultural worker is employment authorized, and can travel abroad and reenter the United States in the same manner as an alien lawfully admitted for permanent residence.

4. What Reforms Does the Legislation Make to the Current H-2A Temporary and Seasonal Agricultural Worker Program?

The AgJobs Act streamlines the existing H-2A foreign agricultural worker program while preserving and enhancing key labor protections. Employers seeking to employ H-2A foreign workers in seasonal jobs (10 months or less) must file an application and a job offer with the Secretary of Labor. If the application and job offer meet the requirements of the program and there are no obvious deficiencies, the Secretary must approve the application. Employers must seek to employ qualified U.S. workers prior to the arrival of H-2A foreign workers by filing a job order with a local job service office at least 28 days prior to the date of need and also authorizing the posting of the job on an electronic job registry. In addition, employers must make reasonable efforts to contact former U.S. workers to fill the position and, no later than 14 days before the date of need, must advertise the job opportunity in a publication likely to be patronized by agricultural workers. Emergency provisions allow the Secretary of Labor to waive the recruitment provisions where there is insufficient time before the date of need, and the need could not reasonably have been foreseen.

H-2A foreign workers are admitted for the duration of the initial job, not to exceed 10 months, and may extend their stay if recruited for additional seasonal jobs, to a maximum continuous stay of three years, after which the H-2A foreign worker must depart the United States. Prior to reapplying for admission as an H-2A worker, the individual must remain outside the United States for a continuous period equal to at least 1/5 the duration of the alien's previous period of authorized status as an H-2A worker, including any extensions. A special exception is provided for sheepherders, who may be admitted for a period of 12 months, with extensions permitted for a maximum continuous stay of three years.

H-2A foreign workers are authorized to be employed only in the job opportunity and by the employer for which they were admitted. Workers who abandon their employment or are terminated for cause must be reported by the employer, and are subject to removal. H-2A foreign workers are provided with a counterfeit-resistant identity and employment authorization document. Like the existing H-2A program, the reformed H-2A program as envisioned by the AgJobs Act provides for temporary, seasonal labor and contains no mechanism for adjustment to permanent status.

5. What Labor Standards Are Provided for in the Bill?

All workers in job opportunities covered by an H-2A application must be provided with workers' compensation insurance, and no job may be filled by an H-2A worker that is vacant because the previous occupant is on strike or involved in a labor dispute. If the job is covered by a collective bargaining agreement, the employer must also notify the bargaining agent of the filing of the application. If the job opportunity is not covered by a collective bargaining agreement, the employer is required to provide additional benefits, as follows. The employer must provide housing at no cost, or a monetary housing allowance where the Governor of a State has determined that there is sufficient migrant housing available, to workers whose place of residence is beyond normal commuting distance. The employer must also reimburse inbound and return transportation costs to workers who meet employment requirements and who travel more than 100 miles to come to work for the employer. The employer must guarantee employment for at least three quarters of the period of employment, and assure at least the highest of the applicable statutory minimum wage, the prevailing wage in the occupation and area of intended employment, or a reformed Adverse Effect Wage Rate (AEWR). If the AEWR applies, effective

on the date of the bill's enactment and continuing for three years thereafter, the AEW will not be higher than that existing on January 1, 2003. If Congress fails to enact a new wage rate within three years, the AEW will be indexed to the change in the consumer price index, capped at 4 percent per year beginning December 1, 2006. Employers also must meet specific motor vehicle safety standards.

With regard to the Earned Adjustment Program, workers alleging that they have been terminated without cause and deprived of qualifying days of work are entitled to arbitration. If the arbitrator rules in favor of the worker, the decision can result only in a credit of work days or hours but cannot be used for any other purpose in any other litigation. In addition, since workers in the Earned Adjustment Program will be treated as non-H-2A workers, they are covered by the principal federal employment statute for farm workers—the Migrant and Seasonal Agricultural Protection Act of 1983.

6. What Enforcement Mechanisms are Included in the Bill?

The Secretary of Labor is required to provide a process for filing, investigating and disposing of complaints, and may order back wages and civil money penalties for program violators. The Secretary of Homeland Security may order debarment of violators for up to two years. H-2A workers are provided with a limited federal private right of action to enforce the requirements of housing, transportation, wages, the employment guarantee, motor vehicle safety, retaliation and any other written promises in the employer's job offer. Either party may request mediation after the filing of the complaint. State contract claims seeking to enforce terms of the H-2A program are preempted by the limited federal right of action. No other state law rights are preempted or restricted.

7. Is the AgJobs Legislation an Amnesty Program?

No. Under the bill, workers would have to demonstrate past work experience and would have to make a substantial future work commitment to earn the right to remain in this country. Moreover, the AgJobs earned adjustment program would be a one-time opportunity for workers already in present in this country who have a significant U.S. work history, so it would not encourage future unauthorized migration.

8. Why Not Simply Maintain the Current Agricultural Guest Worker Program?

The current agricultural guest worker (H-2A) program is outdated and unworkable, seriously impacting the ability of agricultural entities to secure and maintain a legal workforce. Currently, agricultural employers who are unable to hire sufficient numbers of domestic workers for their operations are required to undergo a complicated, lengthy, uncertain, and expensive process of demonstrating such shortage to the government. Only then are they permitted to arrange for the hiring of temporary nonimmigrant guest workers. Indeed, the current H-2A program is so difficult to navigate and expensive that it places only about 40,000-50,000 guest workers per year—a mere 2 to 3 percent of the estimated total agricultural work force. A General Accounting Office study found that the Department of Labor missed statutory deadlines for processing employer applications to participate in the H-2A program more than 40% of the time. Moreover, workers without the proper documentation must live in the shadows and are vulnerable to severe exploitation.

The AgJobs Act would replace the current bureaucratic nightmare for both employers and prospective workers with a “win-win” solution. A streamlined “attestation” process similar to the

one used in connection with the H-1B program would speed up the certification of H-2A employers and the hiring of needed workers. H-2A workers would have new rights to seek redress through mediation and federal court enforcement of specific rights. American consumers also would benefit from a safe, stable, American-grown food supply rather than having to rely increasingly on foreign imports. The AgJobs Act would bring about the comprehensive reforms needed to stabilize the current agricultural labor crisis and would ensure a future workforce for the labor-intensive U.S. agricultural sector.

9. How Does this Legislation Make Us Safer?

Once enacted, the bill's provisions are a positive gain for both workers and employers by creating a stable labor force and a useable program through which future workers can legally enter. With the enactment of this legislation, an estimated 500,000 workers would be brought out of the underground economy and would be scrutinized by our government as they begin the process toward legal status. Moreover, future guest workers under the H-2A program would be screened and monitored to address security concerns. By encouraging people to come out of the shadows and be reviewed by our government, this measure will enhance our security by helping us know who lives and works within our borders, thereby allowing our government to focus on the people who mean to do us harm rather than on those who cross our borders to fill our labor market needs.

10. Who Supports the Agricultural Job Opportunity, Benefits, and Security Act?

The AgJobs Act is supported by a bipartisan group of Senators and Representatives. Joining Senate sponsors Larry Craig (R-ID) and Edward Kennedy (D-MA) are an additional 49 cosponsors, including 26 Democrats and 23 Republicans. On the House side, 79 cosponsors have joined original sponsors Chris Cannon (R-UT) and Howard Berman (D- CA) in support of the bill, including 40 Democrats and 39 Republicans.

In addition, the AgJobs Act also is supported by a variety of agricultural groups, including the American Farm Bureau Federation, the National Council of Agricultural Employers, the American Nursery and Landscape Association, along with dozens of other agricultural groups. Many business and labor groups also support the legislation, including the U.S. Chamber of Commerce and the Essential Worker Immigration Coalition, a coalition of over 30 national businesses, trade associations, and other organizations. In addition, along with the American Immigration Lawyers Association, other groups supporting the AgJobs Act include the AFL-CIO, the League of United Latin American Citizens (LULAC), MALDEF (Mexican American Legal Defense and Educational Fund, the National Council of La Raza, the National Immigration Forum, the United States Conference of Catholic Bishops, the United Farm Workers, and the William C. Velasques Institute (WCVI).

The broad-based support for this measure is also evident in the press. Most recently, a January 14, 2004 *Seattle Times* editorial stated: "AgJobs is a smart start, a pilot project even, for the necessary larger conversation about immigration reform." The *New York Times*, in a January 12, 2004 editorial, urged: "[President Bush should put] his shoulder behind the AgJobs package that already has strong support from business, labor, Republicans and Democrats." And, a December 24, 2003, editorial in the *Palm Beach Post* stated: "[AgJobs] also could improve guest-worker programs to guard against smuggling and abusive conditions outlined in the *Post's* recent series on migrant farmworkers." The *Miami Herald* stated in an October 20, 2003, editorial: "Congress needs to approve the Agricultural Job Opportunity Benefits and Security Act, which promises to benefit growers as well as farmworkers. President Bush would do the nation a great service by reengaging in a once-promising immigration dialogue..." In an October 13, 2003, editorial, the

Modesto Bee stated: “[The AgJobs bill] also recognizes a stark reality. Not enough American citizens are willing to work in agriculture. American agriculture needs these immigrant workers.” The *Los Angeles Times*, in an October 1, 2003 editorial, observed: “When conservative Republicans and liberal Democrats, big farmers and union activists agree on something, it’s worth noting. When their consensus concerns as complicated and freighted an issue as immigration reform, there’s even greater reason to think something worthwhile is stirring.” Finally, the *Denver Post*, in a September 28, 2003 editorial, advised: “We encourage lawmakers to pass [AgJobs] as a positive step toward national immigration reform that begins to address the reality of the overall immigration situation and goes even further to address the deeper underlying problem, poverty and exploitation of low-income workers.”

11. How is S. 1645/H.R. 3142 the First Step toward Comprehensive Immigration Reform?

The AgJobs Act addresses both the near- and the long-term needs of the agricultural sector by taking a two-pronged approach to achieving a stable, legal, agricultural work force. The legislation’s long-term focus is on streamlining the H-2A guest worker program to make it more practical, secure and fair, while short-term relief is provided through the bill’s earned adjustment program. Thus the bill recognizes that immigration reform must include both a legal means by which employers can hire foreign workers in the absence of available U.S. workers and a means to legitimize the status of those immigrants already present in the U.S. that have been supporting our economy with their labor. While the legislation focuses on the unique needs of the agricultural sector, its dual-pronged approach sets the stage for much-needed comprehensive immigration reform that targets principally the service sector of our economy. Such global reform would require three components: legalization for undocumented immigrants living and working in the U.S.; a new worker program that would legalize future flows of essential workers; and a reduction of the backlogs in family-based immigrant visas. Comprehensive reform is absolutely necessary to fully address our economic, humanitarian and security needs.

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